**IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA**

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| STATE OF OKLAHOMA, *et al.*<br><br>Plaintiffs,<br><br>vs.<br><br>TYSON FOODS, INC., *et al.*<br><br>Defendants. | Case No. 05CV0329JOE-SAJ |

**REPLY TO PLAINTIFFS' RESPONSE TO TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC. AND COBB-VANTRESS, INC'S COBB-VANTRESS, INC.'S MOTION FOR MORE DEFINITE STATEMENT WITH RESPECT TO COUNTS ONE AND TWO OF THE FIRST AMENDED COMPLAINT**

Defendants, Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc. and Cobb-Vantress, Inc.'s ("Tyson Defendants") filed their Motion for More Definite Statement With Respect to Counts One and Two of the First Amended Complaint (the "Motion") seeking the Court's assistance in requiring the State Plaintiffs to sufficiently and particularly identify the "facilities" or "superfund sites" which the State Plaintiffs allege the Tyson Defendants contaminated with hazardous substances.[1] In their

[1] The State Plaintiffs currently define the facility as: "The IRW, including the lands, waters and sediments therein, constitutes a 'site or area where a hazardous substance … has been deposited, stored, disposed of, or placed, or otherwise come to be located; . …' and, as such, constitutes a 'facility' within the meaning of CERCLA, 42 U.S.C. § 9601(9). Furthermore, the grower buildings, structures, installations and equipment, as well as the land to which the poultry waste has been applied, also constitute a 'facility' within the meaning of CERCLA, 42 U.S.C. § 9601(9), from which the 'releases' and/or 'threatened releases' of 'hazardous substances' into the IRW, including the lands, waters and sediments therein, resulted." *See* First Amended Complaint ¶¶ 72, 81. The IRW consists of "1,069,530 acres". First Amended Complaint, ¶ 22.

Response, the State Plaintiffs claim that the term "facility" under CERCLA should be broadly interpreted so as to allow the State Plaintiffs in this case to rest on their allegation that the entire IRW constitutes a CERCLA facility. The State Plaintiffs' argument is contrary to the great weight of CERCLA authority and, indeed, is contradicted by the very cases they cite in their Response.

The State Plaintiffs, in an attempt to argue that designating the entire IRW as the "facility" under CERCLA is somehow definite and particular, discuss *United States v. Township of Brighton*, 153 F. 3d 307 (6th Cir. 1998). The State Plaintiffs quote sparse sections of *Brighton*, attempting to apply those selective quotes to the issues raised by the Tyson Defendants in their Motion. Upon closer examination, it becomes clear that the court's holding in *Brighton* actually supports the contention of the Tyson Defendants that the State Plaintiffs' attempt to broadly define the entire IRW as the "facility" in the present case is improper.

The "facility" in *Brighton* was "a plot of land in Brighton Township comprising roughly 15 acres." *Id.* at 310. The 15 acre section of land was owned by the Collett family and the Township contracted with the Collett family to use a portion of the 15 acre tract as a "dump for town residents." *Id.* In 1989 a federal field investigation team examined the property and determined that there were hazardous materials there, particularly around a cluster of 200 drums. Later an EPA assessment team determined the site met the criteria under the National Contingency Plan and estimated the costs of a removal action at $400,000. *Id.* at 311. The United States then incurred costs and in March 1996 a three-day trial commenced and the district court ruled from the bench that Collett family and the Township were jointly and severally liable under CERCLA for

$490,948.32 in response costs. The township appealed, arguing *inter alia*, that the "dump comprised only three acres of the southwest corner of the fifteen-acre Collett property, and that those three acres contained no hazardous waste-therefore, the government should have defined the bounds of the site in a way that excluded the dump." *Id.* at 312.

> The Sixth Circuit defined the issue before it as follows:
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> > to determine how broadly or narrowly the bounds of the 'site' may be drawn. At one extreme, the entire Collett property (or the entire county for that matter), could be defined as a facility based on the presence of a hazardous substance in one portion of it. At the other extreme, the facility could be defined with such precision as to include only those specific cubic centimeters of Collett's property where hazardous substances were deposited or eventually found. The first approach *would sweep too broadly*, the second too narrowly.

*Id.* (Emphasis added). While the court ultimately held that the entire 15 acre tract could constitute a CERCLA facility, it recognized that "the bounds of a facility should be defined at least in part by the bounds of the contamination." *Id.* at 313. On the facts present in that case, the court concluded that the "Collett family used the entire property [the fifteen acres] as a dump, and so it is appropriately classified as a single facility." *Id.* The court further stated that if "an area that cannot be reasonably or naturally divided into multiple parts or functional units it should be defined as a single 'facility' even if it contains parts that are non-contaminated." *Id.* In fact, many CERCLA sites are defined according to the property boundaries of the property where the release occurred.

The "facility" claimed in the present case in no way resembles the 15 acre tract approved by the Court in *Brighton*. Unlike the defendants in the *Brighton* case, the Tyson Defendants do not own or control the land that is claimed as the facility. To the contrary, the 1 million plus acres comprising the IRW is owned and controlled by countless individuals and entities including, municipalities, farmers, ranchers, residents, business owners and even the State of Oklahoma itself. Accordingly, the Tyson Defendants, unlike the defendants in *Brighton*, can not be reasonably expected to have knowledge regarding what occurred on lands comprising the facility.[2]

It is also clear that unlike the 15 acre tract of land in *Brighton*, the 1 million acre IRW **can** be reasonably and naturally divided into multiple parts or functional units. In fact, the IRW has been divided into identifiable parts including tracts, ranges, townships, cities and counties. All of the IRW has been divided by property ownership boundaries which can be easily determined by a review of public record. As such, under the reasoning of the *Brighton* court and the legal authority identified by the Tyson Defendants in their Motion,[3] the State Plaintiffs must limit the definition of the "facility" in this action by identifying those tracts of property which they contend have been

[2] The State Plaintiffs argue in their response that the Tyson Defendants are "charged under the with the knowledge" of the location of all contamination allegedly arising from the land application of poultry litter simply because the State Plaintiffs' have alleged in their complaint that "the Poultry Defendants are responsible for the proper storage, handling and disposal of their respective poultry waste." Plaintiffs' Response, p. 6, fn. 3. They fail, however, to cite any legal authority supporting this notion.

[3] The State Plaintiffs claim that the decision in *New Jersey Turnpike Authority v. PPG Industries, Inc.*, 197 F. 3d 96 (3rd Cir. 1999) rejecting a virtually identical broadly defined "facility" is "simply irrelevant" to this case, but they fail to distinguish that case or explain why the rationale of that decision should not apply with the equal force to the present case.

contaminated by the release of hazardous substances originating from poultry litter applications.[4]

In order for the Tyson Defendants to accurately admit or deny the allegations set forth in the First Amended Complaint with respect to the "facility" they would be required to analyze every square inch of the IRW, most of which they have no access to. The law does not require such action as that would plainly be unreasonable. The law requires the State Plaintiffs to state a claim which is sufficient, definite and particular enough to enable the defendant to prepare a response and prepare for trial. *Clyde v. Broderick*, 144 F.2d 348 (10 Cir. 1944). Alleging that over 1,000,000 acres of land and water is a superfund site is clearly not sufficient, definite or particular. Without identification of the specific locations which the State Plaintiffs claim have been contaminated and are in need of clean up, the Tyson Defendants cannot accurately and appropriately respond to the allegations in Counts 1 and 2 of the First Amended Complaint. The actual locations of the "facility" or "facilities" must be identified in order for the Tyson Defendants to reasonably respond to the First Amended Complaint and to begin preparing for the trial of this matter. Because the State Plaintiffs have

[4] Interestingly, Plaintiffs do cite *Sierra Club, Inc. v. Tyson Foods, Inc.* 299 F. Supp. 2d 693 (W.D. Ky. 2003) and *Sierra Club v. Seaboard Farms, Inc.* 387 F. 3d 1167 (10th Cir. 2004) to support their overly broad "facility". Contrary to this matter, in both the *Seaboard Farm* and *Tyson* cases the facilities were specifically identified buildings and farms, not mass expanses of land. The State Plaintiffs' reliance on the summary judgment ruling of this Court in *City of Tulsa v. Tyson Foods, Inc,* 258 F. Supp. 2d 1263 (N.D. Okla. 2003) (*Order Vacated)*. is also misplaced. That order has been *vacated*. Furthermore, the only ruling the court made on the CERCLA "facility" issue in that case was to *deny* the plaintiffs' request for a finding that the entire watershed constituted a facility. That request was denied because the plaintiffs failed to present proof as to where litter had allegedly contaminated lands in the watershed. *Id.* at 33. The State Plaintiffs' facility claim in the present case suffers from the same defect.

refused to do so, the Tyson Defendants respectfully request that this Court issue an order directing the State Plaintiffs to provide a more definite statement with respect to Counts 1 and 2 of the First Amended Complaint.

Dated: December 6th, 2005

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 6th day of December 2005, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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